

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWINOMISH INDIAN TRIBAL
COMMUNITY, a federally recognized Indian
Tribe,

Plaintiff,

v.

BNSF RAILWAY COMPANY, a Delaware
corporation,

Defendant.

NO. 2:15-cv-00543-RSL

STIPULATION AND ORDER
REGARDING MATERIALITY

The Parties stipulate to the relevance of materiality to the liability phase of this case as follows:

The parties agree and stipulate that based on the rulings made in the Court's Order Regarding Cross-Motions for Summary Judgment (Dkt. 174) and the representations of the parties during oral argument and at the status conference held on September 30, 2022, the Court is not required or requested to make any findings of fact and/or conclusions of law one way or the other whether the breach by BNSF of the Right-of-Way Easement for the period from September 2011 through May 2021 was material. The parties stipulate that by agreeing that materiality is no longer relevant to the liability issues to be raised in this trial, they do not waive their rights to argue in any subsequent proceedings that BNSF's conduct between

September 2011 through May 2021 was or was not a material breach or that any similar conduct in the future is or is not a material breach. The parties further agree that materiality of BNSF's breach is not an element required to be proven in the Tribe's claim for disgorgement of BNSF's profits as damages.

DATED this 10th day of November, 2022.

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***Attorneys for Defendant BNSF Railway
Company***

1 PURSUANT TO THE ABOVE STIPULATION, THE COURT ORDERS that:

2 1. Materiality of the breach by BNSF of the Right-of-Way Easement for the period from
3 September 2011 through May 2021 is no longer relevant to the issues to be decided in the liability
4 trial set for March 20, 2023. The Court will therefore not make any findings or conclusions one
5 way or the other with respect to whether BNSF's breach of the Right-of-Way Easement was
6 material.

7 2. A finding of materiality is not an element required to be proven in the Tribe's claim
8 for disgorgement of BNSF's profits as damages and is not relevant to whether the Tribe's claim
9 for disgorgement of profits is an appropriate remedy.
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11 3. All issues related to damages, including the appropriate damages type, legal theories,
12 and amounts, will be determined after the Court's decision in the liability trial.

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14 IT IS SO ORDERED.

15 DATED: November 14, 2022

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18 Robert S. Lasnik
19 United States District Court Judge
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